SUPREME COURT, U. S.

MAY 26

MICHAEL RODAK

In the Supreme Court of the United States

October Term, 1972

No.

72-1588

GEORGE PETER DELVECCHIO, FRANK PRICCI, LOUIS NEARE and JOHN MUCCIOLO,

Petitioners

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners

v.

United States of America

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Carlon M. O'Malley, Jr., Thomas J. Hanlon, and Todd J. O'Malley, Attorneys on behalf of the Petitioners, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. A, infra) is not yet reported. The opinion of the United States District Court for the Middle District of Pennsylvania is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1973 (App. B, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. May the government offer evidence which alters, changes or augments the original application for electronic surveillance?

2. Was the memorandum from Attorney General John N. Mitchell to Assistant Attorney General Will Wilson a special designation of Wilson to exercise the powers of Title 18 U.S.C. 2516(1) or a direct authorization for the filing of an application to a Federal Judge for an order authorizing the interception of wire or oral communications by the Attorney General himself?

3. Did the Attorney General or any specially designated Assistant Attorney General authorize the applicant, David E. Abrahamsen, to submit an application to a Federal Judge of competent jurisdiction?

4. Are the statutory requirements that the application and order identify the person authorizing the application mandatory?

STATUTES INVOLVED

18 U.S.C. 2516 provides in pertinent part:

"(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, . . ."

18 U.S.C. 2518 provides in pertinent part:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that

has been, is being or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted; . . ."

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to,

listed in the name of, or commonly used by such person."

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application;"

STATEMENT

1. The Petitioners in this case were charged with violation of Title 18 U.S.C. 371, and Title 18 U.S.C. 1955, in that they did willfully and knowingly conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business.

Prior to trial, the government notified your Petitioners that it intended to use at trial evidence obtained from court authorized electronic surveillance. Your Petitioners filed various motions to suppress, including motions challenging the procedure under which the application for electronic surveillance was authorized within the Department of Justice. The government opposed these motions and filed affidavits similar to those filed in *U. S. v. Giordiano,* No. 72-1057, this term, certiorari granted March 26, 1973, and *U. S. v. Chavez,* No. 72-1319, certiorari granted May 21, 1973.[1]

On January 28, 1971, David E. Abrahamsen, Department of Justice trial attorney, and the affiant in this case, presented an application for electronic surveillance to Michael H. Sheridan, Chief Judge, United States District Court for the Middle District of Pennsylvania. The application recited that Will Wilson, Assistant Attorney

[1] Affidavits of John N. Mitchell, former Attorney General, Sol Lindenbaum, Executive Assistant to the Attorney General, Will Wilson, former Assistant Attorney General, Criminal Division, Henry E. Petersen, Assistant Attorney General, Criminal Division (former Deputy Assistant Attorney General) were filed.

General, had authorized the affiant, Abrahamsen, to submit the application to a judge of competent jurisdiction, and that the Attorney General "has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant (Abrahamsen) to make this application for an order authorizing the interception of wire communications. This letter of authority signed by the Assistant Attorney General is attached to this application as Exhibit A."

Thereafter, the court found probable cause and issued wire interception orders. These orders specified that government agents were authorized to act pursuant to the application authorized by Assistant Attorney General Wilson "who has been specially designated in this proceeding by the Attorney General . . . to exercise the powers conferred on the Attorney General by Section 2516 of Title 18. . ."

2. After a hearing on the motion to suppress, at which it was revealed that Assistant Attorney General Wilson had neither seen the file nor signed the letter of authority, but rather that Will Wilson's signature had been affixed to the "Wilson letter" by Henry E. Petersen, then a Deputy Assistant Attorney General, the District Court entered an order suppressing the wire tap evidence and its fruits. The District Court based its ruling on its finding in a similar case, *U. S. v. Casale et al.*, 341 F. Supp. 374, which held that no one specified in Section 2516 of Title 18 U.S.C. had authorized the affiant to submit the application to the Court.

The government, at the time of the suppression hearing, filed the affidavit of Sol Lindenbaum, Executive

Assistant to the Attorney General, with a memo from John N. Mitchell, Attorney General, to Will Wilson, Assistant Attorney General, attached. The government contended that this memo initialed by Mr. Mitchell was a direct authorization of wire tap by the Attorney General himself, and that even if the application and order specified Will Wilson as the person who authorized the application in violation of Sections 2518(1) (a) and (4) (d) of Title 18 U.S.C. there had been none the less substantial compliance with the intent of Title III (Title 18 U.S.C. 2510-20). It is the contention of the defendant that the memo was not a direct authorization for electronic surveillance by the Attorney General, but rather a "special designation" of Wilson to exercise the powers conferred on the Attorney General by Section 2516 of the act.

On appeal, the Third Circuit Court of Appeals accepted the government's contention and reversed the District Court holding that various sections of Title III (Title 18 U.S.C. 2510-20) had been substantially complied with or that if there were any violations, they were harmless. *U. S. v. Ceraso,* 3rd Cir. 1972, 467 F. 2d 647, and *U. S. v. Delvecchio et al.,* No. 72-1681, decided April 26, 1973.

REASONS FOR GRANTING THE WRIT

The ruling of the court below that failure to comply with Sections 2518(1)(a) and (4)(d) requiring the identification of the officer authorizing the request for electronic surveillance both in the application to intercept wire communications and the court order granting such permission is harmless, is in stark contrast with the ruling of the 9th Circuit in *U. S. v. Chavez et al.*, No. 72-2240, decided February 28, 1973; certiorari granted May 21, 1973, and filed to October Term number 72-1319 of this court.

In *Chavez*, the 9th Circuit held that the wire tap was legally defective because the application for the order and the order itself misidentified the officer who had authorized the application in violation of Section 2518(1)(a) and (4)(d). (In both *Chavez* and this case *Delvecchio*, the application and order both specified Will Wilson as the authorizing officer and it is conceded by the government in both cases that Will Wilson did not, in fact, authorize the application.) The court in *Chavez* found that the purpose of the latter section was to fix responsibility in "only a few specially identified and publicly responsible officials" in order to avoid an "institutional decision" and that the form of the application for the orders in the *Chavez* case "had the defect of obscuring from public view the identity of the persons making the decision and the factors which influence their formulation of policy". The court in *Chavez* concluded that suppression was necessary to avoid countenancing "an

apparent deliberate deception of the court by the highest law officers of the land."

2. A review of the Department of Justice procedures for approving requests for the interception of wire communications is essential if the congressional mandate set out in Section 2518(1)(a) and (4)(d) requiring the officials responsible for approving such requests have his identity made known to the court before any court orders issue, is to have any validity.

3. Finally, if the ruling of the Third Circuit is allowed to stand by this court, it will result in a total frustration of the congressional scheme for acquiring approval for the interception of wire communications and constitute an approbation for "an apparently deliberate deception of the courts by the highest law officers of the land."

CONCLUSION

Because of the explicit conflict between the Third Circuit and Ninth Circuit and the substantial practical importance of the issues, this petition for writ of certiorari should be granted. The ruling herein reversing the District Court's order of suppression involves the same issue presented in *U. S. v. Chavez,* in which case this court granted certiorari on May 21, 1973, to No. 72-1319. The issue is the consequence of inaccurate statements regarding the identity of the authorizing officer.

Since the issue in this case is the same as the issue in *U. S. v. Chavez,* supra, for which certiorari has been granted, we respectfully suggest that certiorari should be granted in this case, or, in the alternative, no action be taken on this petition until after the court's decision in *U. S. v. Chavez,* supra.

Respectfully submitted,
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Attorneys for Petitioners.

Of Counsel:

CARLON M. O'MALLEY, SR.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were mailed to the following named attorneys at the addresses listed below this 25th day of May, 1973.

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 72-1681

United States of America,

Appellant

v.

George Peter Delvecchio, Frank Pricci, Louis Neare, and John Mucciolo et al.

(D. C. Criminal No. 14913)

Appeal From the United States District Court for the Middle District of Pennsylvania

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Submitted Under Third Circuit Rule 12 (6)

March 19, 1973

Before Seitz, *Chief Judge,* Aldisert and Adams, *Circuit Judges*

Appendix A—Opinion

OPINION OF THE COURT
(Filed April 26, 1973)

S. John Cottone,
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Scranton, Pennsylvania,

Sidney M. Glazer,
John J. Robinson,
Attorneys, Department of Justice,

Raymond E. Makowski,
Special Attorney, Department of Justice,
Attorneys for Appellant.

Thomas J. Hanlon,
Carlon M. O'Malley, Jr.,
Attorneys for Appellees.

Per Curiam:

The United States appeals from a decision suppressing a wiretap authorized under the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq. (1971).

The defendants were charged with a substantive count and a conspiracy count of conducting an illegal gambling business in violation of 18 U.S.C. §1955 (1971). They pleaded guilty to the conspiracy count, subject to the condition contained in a stipulation of counsel that they would be permitted to withdraw their pleas

in the event their motion to suppress the fruits of the wiretap was granted. The defendants challenged the wiretap and the evidence derived therefrom on the ground that the application for the court order authorizing the interception of the wire communication was improperly approved. The challenged evidence was obtained under a court authorization of January 28, 1971, after submission of an application for the wiretap *personally approved* by Attorney General Mitchell pursuant to 18 U.S.C. §2510 et seq.

The district court granted the defendants' motion to suppress the fruits of the wiretap:

> [This district court] granted the motions . . . to suppress the fruits of a wiretap in the case of U.S.A. v. Casale, et al. [341 F. Supp. 374 (M.D. Pa. 1972)]. From the affidavits submitted by the Government in the instant case, it appears that the defendants' motion to suppress in the [instant] case must be granted on authority of this [district court's] opinion in U.S.A. vs. Casale, et al.

U. S. v. Delvecchio, F. Supp. , (M.D. Pa. June 8, 1972) (Crim. No. 14913).

Casale was reversed on appeal in U. S. v. Ceraso, 467 F. 2d 647 (3d Cir. 1972), because the attorney general *personally approved* the wiretap application. Since the application procedure employed for the issuance of the wiretap order in the instant case was the same as that held to be proper in Ceraso, the grant of defendants' motion to suppress must be reversed.

The order of the district court will be reversed. The case will be remanded to the district court for further proceedings in conformance with this opinion.

To the Clerk of the Court:

Please file the foregoing opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 72-1681

United States of America,

Appellant

vs.

George Peter Delvecchio
Frank Pricci
Patrick Cerroni
Benjamin Smith
Harry Solomon
Louis Neare
Albert Mazzillo
John Skripka
Ann Chuya, a/k/a "Duchess"
Thomas J. Smith
Joseph Mucciolo, Sr., a/k/a "Babe"
Anthony Piledggi

(D.C. Criminal No. 14913)

On appeal from the United States District Court for the Middle District of Pennsylvania.

Appendix B—Judgment

Present: Seitz, Chief Judge and Aldisert and Adams, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that that portion of the order of the said District Court, filed June 8, 1972, which suppressed evidence gotten from the wiretap be, and the same is hereby reversed, and the cause remanded to the said District Court for further proceedings in conformance with the opinion of this Court.

Attest:

Thomas P. Quinn
Clerk

April 26, 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1588

GEORGE PETER DELVECCHIO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners challenge the validity of a court-ordered wire interception on the ground that the application for the order identified the Assistant Attorney General in charge of the Criminal Division as the person within the Department of Justice who authorized its filing when in fact the Attorney General personally did so.

Petitioners were charged in a two-count indictment with having conducted and having conspired to conduct an illegal gambling business in violation of 18 U.S.C. 1955. On January 17, 1972, in the United States District Court for the Middle District of Pennsylvania, they entered pleas of guilty to the conspiracy count on a stipulation that they might withdraw the pleas in the event that the court ruled to suppress the wire interception evidence on which the prosecution was primarily based. This evidence had

been obtained from a telephone interception conducted pursuant to a court authorization dated January 28, 1971. The wire interception was conducted on two telephones in the home of petitioner Delvecchio in Dallas, Pennsylvania, and, pursuant to another court order, a pen register to record the telephone numbers of outgoing telephone calls was also installed on those telephones.

Petitioners filed pre-trial motions to suppress the evidence obtained from the judicially approved wire interceptions. On June 8, 1972, the district court entered an order suppressing the wire interception evidence and evidence derived therefrom. The government appealed pursuant to 18 U.S.C. 3731 and 2518(10(b). The court of appeals reversed, *per curiam,* citing its decision in *United States* v. *Ceraso,* 467 F. 2d 647 (C.A. 3) (Pet. App. A).

In the present case, the affidavits filed in the district court showed that the application for the wire interception order was personally authorized by then Attorney General John N. Mitchell, after it had been processed through the standard procedure within the Department of Justice, as set forth in detail in our petition for certiorari and brief on the merits in *United States* v. *Giordano,* No. 72-1057, certiorari granted, March 26, 1973. However, the application for the order identified the Assistant Attorney General in charge of the Criminal Division as the person within the Department who authorized its filing. Whether, contrary to petitioners' contention, that procedure renders the subsequent interception illegal is an issue now pending before this Court in *United States* v. *Chavez,* No. 72-1319, certiorari granted, May 21, 1973, as well as *Giordano.*[1]

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[1]Our petitions and briefs in *Giordano* and *Chavez* are being furnished to petitioners' counsel.

Accordingly, the Court may wish to defer disposition of the present petition pending its decisions in *Chavez* and *Giordano*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JULY 1973.